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No. 1000

In The Supreme Court of the United States

OCTOBER TERM, 1964

CLARENCE H. McKINLEY,

Appellant,

v.

CHRIS A. REILLY, C. STANLEY CLEGG, and HUGH DUGAN, as Members of the Arizona State Board of Funeral Directors and Embalmers.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S REPLY BRIEF

MARK WILMER and
CHARLES M. BREWER
Attorneys for Appellant
400 Security Building
Phoenix, Arizona 85004

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APPELLANT'S REPLY BRIEF TO MOTION TO DISMISS

ARGUMENT

Appellees move to dismiss this appeal under Rule 16-1(b) of the Revised Rules of this Court, asserting the absence of a substantial federal question. Inherent in the motion is the admission that the particular statutes (§32-1330A.(2), 32-1331A., and 32-1337-2. A.R.S.) enacted by the legislature of the state (1) create and provide unequal privileges and immunities as among persons of the same class and locality within the state, and (2) deny the excluded class the equal protection of laws demanded by the Fourteenth Amendment of the United States Constitution.

Appellees' motion is presented in two parts, entitled: II. *the nonexistent equal protection issue,* and III. *the significance of the due process question.* Appellees' denomination of the issue in such manner is a purely arbitrary one, because the statutes complained of infringe upon the rights, privileges and liberties of the Appellant, all of which are guaranteed by the Fourteenth Amendment of the Federal Constitution. The cases cited in Appellant's brief and relied upon therein do not make a distinction between equal protection and due process, nor shall we. Therefore, this reply will be directed as nearly as possible to the points raised in the motion, and as nearly as possible to the order in which they appear therein.

Appellees' first contention, pages 2-3 of the motion, that "equal protection" arises from McKinley's argument that A.R.S. §32-1337 allowing the issuance of a funeral director's license to the widow of a funeral director who was not an embalmer, or to the estate of a deceased funeral director (J.S. 4) is incorrect. The substantial nature of the federal question presented here is amply demonstrated by the arguments and authorities in support thereof, found at pages 9 through 21 of appellant's opening brief and which require no reiteration.

Appellees' second contention at page 3 and top of page 4 of the motion to the effect that this appeal may not be heard for the reason that the Arizona Statute §32-1337, "has neither been authoritatively construed nor applied by the state courts" is further incorrect for the reason that the particular statutes sought to be invalidated, §32-1330A(2) and §32-1331A, A.R.S., were in fact adjudicated by the Arizona Supreme Court and their constitutionality upheld. It is true as appellees there point out that the state court did not reach the question of the constitutionality of §32-1337-2, A.R.S., but this section of the act was before the court only to demonstrate that the law was palpably discriminatory and that the pretended classifications set up in the statutes did not rest upon any reasonable basis, but were essentially arbitrary in character. This Court is not confined to the view of the facts or law taken by

the state court, but as stated:

> *"We may make an independent examination of the record." Doremus v. Board of Education,* 342 U.S. 429,434, 96 L.Ed. 475,479, 72 S.Ct. 394 (1952)

As a last argument on what is denominated the "equal protection aspects" of this appeal, appellees at page 3 and top of page 4 urge that the repugnance of the statutes at issue, to the Fourteenth Amendment, evidenced by the enactment of A.R.S. §32-1337, can be removed by applying the doctrine of severability.

In this regard we note that there is neither a saving nor severability clause in the statutes now before this Court. This Court has held that the failure to provide severability clearly evidences the legislative intent that the statute must be construed as an entirety. Compare:

> *"In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety — that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it." Carter v. Carter Coal Co., 298 U.S. 238,312, 80 L.Ed. 1160,1189, 56 S.Ct. 371.*

In *Utah Power and L. Co. v. Pfost,* 286 U.S. 165,184, 76 L.Ed. 1038,1048,1049, 52 S.Ct. 548, this Court further stated that in the absence of a saving clause that there was a clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. Moreover, this Court has held in *Skinner v. Oklahoma,* 316 U.S. 535,544, 86 L.Ed. 1655,1661, 62 S.Ct. 488, that even though an act has a severability clause, it will not endeavor to determine whether its application would solve the equal protection difficulty. The decision declares that the excision of a portion of a statute is a matter of state law, and that finding unconstitutionality in the sterilization act based upon a violation of the equal protection clause guaranteed by the Fourteenth Amendment, this Court reversed. The same rule is applicable here, since

the same reasons therefor are patent in the record.

Moving next to the argument commencing at page five of the motion, to the effect that Appellant's complaint involves only the validity of §32-1330, we submit that Appellees are again incorrect. Appellant maintains that insofar as §32-1330 A.R.S. compels an applicant for a certificate of qualification as a funeral director to have been

> *"for not less than one year previous to the filing of his application, a qualified practicing embalmer associated with a qualified practicing funeral director"*

denies equal protection of the law within the meaning of the Fourteenth Amendment. This is the plain import of every case in which the same or a similar statutory requirement was attacked in the various jurisdictions cited in Appellant's opening brief.

Reference is again made to the argument and cases on this point in Appellant's brief, pages 9 through 20 thereof. Appellees at page 10 and 11 of the Motion rely on *Vaughn v. State Board*, 196 Va. 141, 82 S.E.2d 618, and *State Board of Funeral Directors and Embalmers v. Cooksey*, 147 Fla. 337, 3 So.2d 502 as holding contra. With respect to Vaughn, supra, it should be pointed out that the Supreme Court of Appeals of Virginia found it necessary to distinguish the Virginia Act from the New York Act construed in *People v. Hurrison*, 156 N.Y.S. 679, 114 N.E. 1076, cited at page 12 of Appellant's opening brief, and *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451, cited at page 20 of Appellant's brief, as follows:

> *"These cases held that the business of undertaking and embalming is properly subject to regulations. However, it was held in People v. Ringe that the requirement of the New York Statute that an undertaker must also have an embalmer's license in order to engage in undertaking was an unreasonable requirement. The Virginia Act has no such provision . . ."*

Therefore, the holdings in *Vaughn* are totally invalid as authority on the questions presented for review because the Arizona Act is identical with that in New York, to-wit: that a funeral director be a licensed or qualified embalmer as a prerequisite:

Proceeding to Appellees' other remaining authority relied upon, to-wit: *Board v. Cooksey, supra,* we observe that this Florida case did not involve a direct attack upon the Florida Statute and further refer to a critique thereof by the Illinois Court found at pages 18 and 19 of Appellant's brief. It will thus appear that the Arizona opinion is clearly not based upon the weight of authority, nor as will be shown, on any reasonable relationship to public welfare, health or morals of the people of this state. Further, the Florida decision and an earlier Virginia decision, to-wit: *Walton v. Commonwealth,* 187 Va. 275, 46 S.E.2d 373, which was the predicate for *Vaughn,* supra, were criticized in *Cleere v. Bullock,* 361 P.2d 616,621 (Colo. 1961) (cited at page 20 of Appellant's brief) and were held not persuasive, the Colorado court stating:

> *"The better reasoned and majority viewpoint holds that a funeral director or undertaker cannot be compelled to have all of the qualifications of an embalmer. This rule recognizes the practical distinction between the two occupations. It differentiates the former on the basis that it demands general knowledge only and not the specialized skill which the embalmer must have."*

It is appellant's position that any regulation under the police power restricting, to the extent of prohibition, an ancient, honorable and necessary calling must justify its validity on the ground that it is essential to the public health, safety, convenience and morals*, and that §32-1330 and §32-1331, A.R.S., have no such sanction. In the appealed Arizona decision constitutionality is upheld upon the state court's conception of a legislative intent to protect the public welfare, health and morals on grounds, in substance, as follows:

1. Geographic and climatic conditions "temperature during most of the year is such that dead bodies will rapidly decompose and disintegrate and that hence it is common practice to embalm bodies in order to preserve them for services and later burial." (Appendix A-5).

**Cleere v. Bullock* — 146 Colo. 284, 361 P.2d 616.

2. That because Arizona has no statutory requirement compelling funeral directors to hire embalmers, the legislature may have believed that in a small community involving "a one-man operation" a funeral director should know how to embalm bodies along with other special knowledge applicable to conducting the final interment of the deceased. (Appendix A-6).

3. That funeral directing has more of the attributes of a "profession" than that of a "commercial business activity" and therefore the ultimate responsibility devolves upon the funeral director to determine whether an embalmer has performed his work properly, making it a reasonable requirement for a funeral director to have the knowledge, qualifications and training of an embalmer. (Appendix A-7).

4. Economic hardship devolving upon the spouses of licensed funeral directors and the estates of deceased funeral directors sanction the exceptions and exemptions set forth in §32-1337, A.R.S. (Appendix A-9).

At the outset it is our respectful submission that Arizona stands alone in upholding the constitutionality of a statute which requires as a prerequisite for the issuance of a funeral director's license that the applicant be qualified as an embalmer. As indicated above, every other jurisdiction where the question has arisen struck down similar legislation because of the denial of either the equal protection clause or the due process clause of the State and Federal Constitutions.

The Arizona court's surmise as to the legislative intent is without support in the record and is destroyed by the effect of the wording and context of the statutes here for review. Throughout the state court's decision the court emphasizes the significance and importance of the practices of embalming and the acts and responsibilities of an embalmer under state law. It is our respectful submission further that the court's preoccupation with the practices and benefits flowing from the embalming of dead human bodies tended to, and did obscure the real issues for decision. This is easily demonstrable because:

1. Embalming is not compulsory. Arizona has no law requiring a dead human body to be embalmed. There are so many well-recognized and ingrained personal preferences, social customs and religious beliefs opposed to the practice of embalming that there is no legislation at all in any state of the union on the subject. *Jackson, The law of Cadavers* 2 ed. p. 438.

2. Arizona law (§32-1361, A.R.S.) provides that if a dead human body is embalmed it must be done by a licensed embalmer. The qualifications required for an embalmer add nothing to his fitness for burying an unembalmed body. To require a licensed embalmer to assist or participate in the burial of an unembalmed body would add nothing to the public health, safety, convenience or morals.

3. The statutory requirement for (§32-1330-2, A.R.S.) that an applicant for a certificate of qualification for a funeral director must have been "for not less than one year previous to the filing of his application a qualified practicing embalmer associated with a qualified practicing funeral director" has no reasonable relationship to the public health, welfare and morals and is therefore an arbitrary and capricious abuse of the police power and this proposition has been unanimously sustained in every state where similar enactments were directly under attack.

4. There is nothing endemic to Arizona by reason of its geographic location or seasonal fluctuations in temperature which is not true of all of the several states bordering Arizona, to-wit: Texas, New Mexico, Nevada and California. Each of these states have large areas of hot arid regions with the extreme fluctuations in temperature as exist in Arizona. It is of particular significance that Arizona adopted the California statute with reference to the business of funeral directors and embalmers. Notable is the fact that the California statute does not require that a funeral director be a qualified embalmer as a condition or prerequisite for licensure. Compare: §6700-9900, *West's Annotated California Business and Professions Code.*

5. The state court's belief that "one-man operations" would be benefited by a requirement that a funeral director be an embalmer is tenuous and misses the mark. Nothing in the Arizona law prevents an embalmer from "free lancing." The Arizona communities are not so widely separated that an embalmer cannot reach any point in the state within 48 hours since this is the criterion obviously applied by the state court and the time limit prescribed by the Arizona State Department of Health, Rules and Regulations, Vital Statistics, Article 5, Part I, Regulation 3 (Appendix A-5).

Furthermore, although the state court seemed to dwell upon the importance of embalming, the above Board of Health Regulation permits and allows a dead human body to be retained for an indefinite period if the same is maintained at a temperature lower than 32°F. Thus the cited regulations will be satisfied if a funeral director merely maintains an icebox large enough to hold dead human bodies at a temperature lower than the prescribed 32°F. We deem that the act of legislation would be equally ridiculous and repugnant to the Fourteenth Amendment if the statute prescribed that every funeral director be a certified refrigeration engineer.

Moreover, the point made in the decision that it is made a crime and unlawful by §32-1368, A.R.S., for an embalmer having knowledge of the fact sufficient to raise a suspicion of a crime related to the cause of death, to embalm a dead human without permission of a coroner, does not militate against the repugnant feature of §32-1330 requiring funeral directors to be embalmers. If the Legislature intended the foregoing act to apply to funeral directors, it could and doubtless would have said so merely by adding those words. Injection into, or treatment of, a human body with chemicals and other preservatives tends to obscure the condition suffered or injury received by the deceased and therefore the statute is restricted to only those who may prevent diagnosis of illness or detection of crime. There is no reason to apply the same restrictions to those dealing with unembalmed bodies because it remains unaltered. The state court implies, contrary to direct statutory definition (§§32-1301(6) and (7)), that funeral directing has more of the

attributes of a "profession" than a "commercial business activity" and thereby the funeral director has a responsibility to the public to determine whether an embalmer has properly performed the embalming process. This reasoning is no more valid than requiring the owner or manager of a drugstore to be a pharmacist. (*Liggett Co. v. Baldrige*, 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57), or requiring a conductor to be a brakeman. (*Smith v. State of Texas*, 34 S.Ct. 681, 233 U.S. 630, 58 L.Ed. 1129) and this same reasoning was rejected in all of the cases cited at page 20 of appellant's opening brief.

From the foregoing it will clearly appear that the statutes in question bear no reasonable relationship to the public welfare, health and morals of the people of the State of Arizona. Such a claim to legislative intent by the members of the Legislature itself would be clearly denied by the effect of §32-1337 which permits and allows the spouse of a deceased funeral director to carry on and conduct (as a licentiate) the business or "profession" of funeral directing without the necessity of being an embalmer. Moreover, the personal representative of such a deceased licensed funeral director, whether individual or corporate, is given the same latitude for a period of nine months. If the Legislature actually considered that the public welfare of the citizens of this state would be endangered or affected by the failure of funeral directors to be qualified embalmers it would have required funeral directors to be embalmers in every case. By allowing some funeral directors and particularly those men and women (the relicts) of deceased licensed funeral directors or untutored corporate fiduciaries to carry on such business is a free and frank admission that no funeral director in Arizona need be an embalmer. The public welfare and health would certainly be jeopardized if any funeral director in this special category were incompetent or careless and allowed dead human bodies to moulder and rot and spread contagion and disease in the community in which the body lay. Can it reasonably be said that the legislature would provide that the public interest be affected or jeopardized in such manner? Isn't it more reasonable to believe that this statute was enacted as a result of a campaign by a powerful, if

rity, pressure group determined to maintain an unlawful opoly and preserve for its members and their spouses a lucra- and non-competitive business.

CONCLUSION

This Court has in two previous cases cited with approval state ourt decisions condemning statutes similar to the one now before he Court as being repugnant to the Fourteenth Amendment. In iggett Co. v. Baldrige, 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57 1928), the decision of *People v. Ringe*, 197 N.Y. 143, 90 N.E. 51 was set forth, and in *Meyer v. Nebraska*, 262 U.S. 390, 67 .Ed. 1042, 43 S.Ct. 625 (1923), the decision of *Wyeth v. Board f Health of Cambridge*, 200 Mass. 474, 86 N.E. 925 (1909) re- ed on.

For the reasons stated herein and in his opening brief, Appellant ubmits the entire Arizona statutes regulating the business of fu- eral directing violates the equal protection clause of the United tates Constitution.

Respectfully submitted,

MARK WILMER and CHARLES M. BREWER

By

MARK WILMER
Attorneys for Appellant
400 Security Building
Phoenix, Arizona